TENGKU MOHD SAAD A

v.

TAY CHIEW FOO

HIGH COURT SABAH & SARAWAK, KUCHING B
RODZARIAH BUJANG JC
[CIVIL APPEAL NO: 12-2-2009-II]
4 MAY 2009

CIVIL PROCEDURE: *Claim for sums owing - Appeal against - Loan - Whether sum a gift or soft loan - Whether there was evidence of repayment - Whether loans statute barred* C

This appeal originated from the decision made by the Sessions Court judge after a full trial, in allowing the plaintiff's claim for the sum of RM55,000 being the amount of soft loan advanced to the defendant at his request. Dissatisfied with the decision, the defendant appealed. The issues that arose were (i) whether the sum of RM55,000 a gift or a soft loan; (ii) whether there was evidence of repayment; (iii) that this appeal was filed in retaliation of the plaintiff losing a Kuala Lumpur suit against the defendant; (iv) whether the loans were statute barred. D E

Held (dismissing the appeal):

(1) If the payments were gifts and not loans, the defendant must adduce evidence (but did not do so) to show the circumstances which prompted the plaintiff's generosity to give away such large sum of money to him at the material time. Gifts of cash in such large amount was not probable or reasonable. The Sessions Court judge was therefore right to conclude that these sums were in fact soft loans given while waiting for the disbursement of the defendant's inheritance. (para 7) F G

(2) The plaintiff had contended that the defendant had made two repayments in the sum of RM3,000 and RM2,000. The fact that they were made was never disputed. There were repayments made by the defendant to the plaintiff as he alleged for the loan he gave. Accepting that there were repayments made by the defendant to the plaintiff strengthened the earlier findings made by the Sessions Court judge that the sum given to the defendant were in fact loans and not gifts. (para 15) H I

(3) This court supported the Sessions Court judge's finding that it was unacceptable that the case herein was in retaliation to the Kuala Lumpur suit. The Kuala Lumpur suit had not been concluded and the perjury charge was still hanging over the defendant's head when the defendant gave evidence in court. The fact that this present matter was filed a year or so after the High Court gave its decision in the Kuala Lumpur suit did not point to a backlash as contended by the defendant, bearing in mind that the repayment period for the sum as agreed by the parties was 13 December 2005. The plaintiff filed this summons and statement of claim on 8 December 2006, a year after the repayment was finally due, so there was no magic in the period of one year as submitted by the defendant 's counsel. In this court's view, if emotions were his motivation, the plaintiff would have filed these actions immediately after losing the Kuala Lumpur suit. (para 20)

(4) The loans were not statute barred because the relevant article in the Sarawak Limitation Ordinance (Cap 49) which governed the transactions was not art. 38 but art. 93. Time would run from the year 2005 since the parties have agreed to pay the loan within ten years and the defendant could only be said to have breached the contract when he failed to pay after the time stated for payment had expired. In other words, the plaintiff's cause of action against the defendant would only accrue in 2005. The plaintiff instituted this action on 8 December 2006, well within the three years mentioned under art. 93. Thus, for all the foregoing reasons, this court affirmed the decision of the Sessions Court judge. (paras 22, 24 & 25)

Case(s) referred to:
Kong Ming Bank v. Sim Siok Eng [1982] 2 MLJ 205 ***(refd)***

Legislation referred to:
Sarawak Limitation Ordinance (Cap 49), arts. 38, 55

Indian Limitation Act, art. 19

Other source(s) referred to:
Sanjiva Row, *The Limitation Act*, 7th edn, vol. 1, p 836

For the appellant - Chan Yin Xi; M/s Batternberg & Talma Advocates
For the respondent - Mohd Ivan Hussein; M/s Ivan Hussein Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Rodzariah Bujang JC:

[1] The appeal originates from the decision made by the learned Sessions Court judge after a full trial, in allowing the plaintiff's claim for the sum of RM55,000 being the amount of soft loan advanced to the defendant at his request. The defendant is dissatisfied with the decision, hence this appeal before me. For ease of reference, I would in this judgment refer to the parties as the plaintiff and defendant respectively.

[2] The defendant's counsel has in his written submission divided the appeal into five issues but having read through the said submission, two of the issues concerning two repayments made by the defendant to the plaintiff's wife can be compressed into one of the issues. I would where necessary reword the headings given by him in respect of these issues and they are identified as follows:

(i) Whether the sum of RM55,000 was a gift or a soft loan.

(ii) Evidence of repayment.

(iii) The related court actions.

(iv) Defence of limitation.

[3] Before going into these issues, it is best that I mention three basic facts agreed by the parties at the trial in the Sessions Court. These facts are:

(i) That the defendant was the son of the plaintiff's friend, Tunku Mansur bin Tunku Yaacob,

(ii) Tunku Mansur passed away on 27 October 1993.

(iii) The defendant did receive some money from the plaintiff.

Now for the issues.

Gift Or Soft Loan

[4] The learned Sessions Court judge found that a sum of RM60,000 (given in two instalments, RM50,000 and RM10,000) has been paid by the plaintiff to the defendant as interest free soft loan for ten years and to be repaid by year 2005 when the

defendant was to receive shares from Harrison Holdings (Malaysia) Sdn Bhd. The RM50,000 was evidenced by a payment voucher (exh. P2) and a RM10,000 by a bank-in-slip (exh. P3). She distrusted the defendant on this issue because he was evasive in his answer whether he did receive the first RM50,000 from the plaintiff which were "I don't know for sure" or "I don't deny possibly receiving the sum ..." or "I cannot recall specifically as I have received some sum from the plaintiff".

[5] In respect of the payment voucher, the defendant's evidence was the signature of the receiver was similar to his but he alleged that possibly it was forged. As for the bank-in-slip, the defendant agreed that the amount stated was banked into his account.

[6] The defendant's counsel submitted before me that the said sum of money were gifts and that I must take judicial notice of the practice of business people to wine and dine their clients and to give gifts, even monetary ones, the extent of which would depend, *inter alia*, on the business opportunity sought.

[7] Whilst I do not dispute that such business practice exists but to say that its existence proved that the money in this case was given as a gift in furtherance of such practice and out of concern for the defendant's personal welfare as alleged by the defendant in his defence, would fly in the face of the evidence presented to the court, in particular, the fact that a payment voucher was issued for RM50,000 and the bank-in-slip was kept by the plaintiff for the RM10,000. If these were gifts to further business opportunities I see no reason for the plaintiff to issue these documents and keep them and if out of concern for the defendant's personal welfare, why was no evidence adduced to show the personal circumstances of the defendant that merited such generosity on the part of the plaintiff? Again, if these payments were gifts and not loans, the defendant must adduce evidence (but did not do so) to show the circumstances which prompted the plaintiff's generosity to give away such large sum of money to him at the material time. I therefore agree with the learned Sessions Court judge that gifts of cash in such large amount was not probable or reasonable and especially, when she considered the improbability of that contention taken with the defendant's evidence that "his inheritance would be worth millions". (see para. 22 of p. 120 of the Appeal Record).

[8] She has also found that these sums of RM50,000 and RM10,000 could not have been remunerations paid to the defendant during the defendant's period of understudying with the plaintiff because the defendant himself did not give an unequivocal answer when asked whether the said sums were remunerations. His answer was 'I thought so, but I never question.' Surely, he would know how much he should be getting if these were indeed remunerations. It is more probable and the learned Sessions Court judge was therefore right to conclude that these sums were infact soft loans given while waiting for the disbursement of the defendant's inheritance. (para. 27 p. 121 of the Appeal Record).

[9] In connection with this issue, learned counsel for the defendant also questioned the learned Sessions Court judge's finding in respect of the purported repayments made by the defendant towards the loan as well as the other court actions filed by the plaintiff against the defendant. It is best that I consider them in the light of the specific issues framed as defined earlier. I would now move on to consider the second issue.

Evidence Of Repayment

[10] The plaintiff has testified, and the learned Sessions Court judge has accepted his evidence that the total loan of RM60,000 was to be paid by the defendant after he received his share of his father's inheritance and that they agreed that it should be paid in ten years time calculated from 13 December 1995 (see plaintiff's witness statement at Q & A 29 p. 135 of the Appeal Record). It is to be noted that the judgment of the learned Sessions Court judge at the continuation of para. 30 on p. 122 of the Appeal Record stated the date as "13 December 2005". I believe she has erroneously stated the year as 2005. 13 December 2005 should be the date the loans were due and the mistake I am sure was unintended and typographical.

[11] Coming back to the plaintiff's contention that the defendant made two repayments in the sum of RM3,000 and RM2,000 on 1 March 2004 and 7 April 2004 respectively, there is no documentary evidence to show these payments were made but the learned Sessions Court judge said in her judgment that the defendant never specifically put it to the plaintiff during cross-examination that these payments were never made. In other words the fact that they were made was never disputed. That seems to me to be the case. A perusal of the Appeal Record shows what

A the defendant's counsel did was to contradict the alleged date of repayments with two receipts dated 9 June 2003 and 8 December 2003. (marked as ID4 and ID5 respectively appearing at pp. 150 and 151 of the Appeal Record).

B **[12]** However, the plaintiff has explained that these two receipts were issued by his wife for a loan given by her to the defendant and yet in his cross-examination of the plaintiff, the defendant's counsel never contradicted him that one, there were no repayments made by the defendant to the plaintiff and two, there C was no such loan from the plaintiff's wife to the defendant. What he did do was to insist that the dates of the two receipts (ID4 and ID5) were in contradiction with the dates given by the plaintiff as the alleged repayments of the loan by the defendant to him.

D **[13]** I would in this respect again agree with the conclusion of the learned Sessions Court judge that there were repayments made by the defendant to the plaintiff as he alleged for the loan he gave and that ID4 and ID5 were evidence of repayments made by the defendant to the plaintiff's wife; not to him. The rule in E *Browne v. Dunn* which has been accepted and applied in many a Malaysian Court has been flouted in this case and it is therefore safe for me to uphold the conclusion made by the learned Sessions Court judge.

F **[14]** In this regard, I do not think it is even necessary to deal with the defendant counsel's submission on the effect of ID4 and ID5 or its relevance to the side issue of repayment or the larger issue on liability of the defendant for the sum claimed. ID4 and ID5 were not even evidence in the trial because they were, from G the record, never tendered as plaintiff's exhibits but merely produced in court for identification.

[15] Coming back to the substance of this appeal, accepting that there were repayments made by the defendant to the plaintiff, H strengthened the earlier findings made by the learned Sessions Court judge that the total sum of RM60,000 given to the defendant were infact loans and not gifts.

The Related Court actions

I **[16]** There were two other Sessions Court cases involving the plaintiff and defendant. Case No. SC-52-1091-2006-II where the parties are the same and suing and being sued in the same

capacity and case No. SC-52-697-2005-I where the plaintiff owned company, Foyin Development Sdn. Bhd sued the defendant.

[17] There were also two other earlier court actions than these Sessions Court cases, filed in the High Court of Alor Setar which involves the plaintiff's company Foyin Development Sdn Bhd and a company in control of the estate of the defendant's late father ("the Alor Setar suit") and another action filed in the Kuala Lumpur High Court where the plaintiff was sued by the estate of the defendant's late father for the return of 4,580,600 shares in Harrison Holdings (Malaysia) Sdn. Bhd. ("the Kuala Lumpur suit"). According to the defendant, the Alor Setar suit was settled out of court and in the Kuala Lumpur suit, judgment was entered against the plaintiff on 6 September 2005.

[18] The defendant alleged that the Sessions Court cases including the one in this appeal were filed in retaliation of the plaintiff losing the Kuala Lumpur suit. It transpired in cross-examination of the defendant however that for the Alor Setar suit the defendant together with Foyin Development Sdn Bhd and the estate of the late father sued Tunku Yaacob Holdings Sdn Bhd but he switched camp when the estate of his late father took over Tunku Yaacob Holdings Sdn Bhd. When he did, he managed to persuade the plaintiff not to proceed with the Alor Setar suit.

[19] As for the Kuala Lumpur suit, the record shows that at the time of trial in the Sessions Court, the case was still pending appeal in the Federal Court and the defendant was also charged for perjury arising from the Kuala Lumpur suit when he admitted during the trial that he forged his late father's signature on a crucial document. That criminal case too was on-going at the time of the trial of this case in the Sessions Court.

[20] The learned Sessions Court judge does not accept that the case before her was in retaliation to the Kuala Lumpur suit and I support her finding on this since the said case has not been concluded and the perjury charge is still hanging over the defendant's head when the defendant gave evidence in court. (see his evidence at p. 107 of the Appeal Record). In my view the fact that this present matter before me was filed a year or so after the High Court gave its decision in the Kuala Lumpur suit does not point to a backlash as contended by the defendant, bearing in mind that the repayment period for the RM60,000 as agreed by the parties was 13 December 2005. The plaintiff filed

this summons and statement of claim on 8 December 2006 also a year after the repayment was finally due, so there is no magic in the period of one year as submitted by the defendant's counsel. If at all this case was a retaliation on the part of the plaintiff, I fail to see why the plaintiff must stew with feelings of vengeance and revenge for one year before acting on these feelings. In my view, if these emotions were his motivation, he would have filed these actions immediately after losing the Kuala Lumpur suit.

[21] Lastly, on the issue of limitation.

Defence Of Limitation

[22] The defendant's counsel submitted that the limitation period of three years under art. 38 of the Sarawak Limitation Ordinance (Cap. 49) should run from 13 December 1995 when the loan of RM10,000 was made. Although I agree that the learned Sessions Court judge should have considered the alternative defence on limitation put by the defendant and not brush it aside just because the defendant has contended that the loan were infact gifts, however I still say that the loans were not statute barred because the relevant article in the said Ordinance which governs the transactions is not art. 38 but art. 93. Sanjiva Row in his book *The Limitation Act* 7th edn, Vol. 1 at p. 836 explained that art. 19 of the Indian Limitation Act which is in *pari materia* with art. 38 and upon which the Sarawak Limitation Ordinance is based (see the judgment of the Privy Council in *Kong Ming Bank v. Sim Siok Eng* [1982] 2 MLJ 205 where this statement was made) only applies to loans where no time is fixed for repayment of the loans. The learned author has this to say about the said art. 19:

> This Article is applicable to loans payable at once or payable on demand. It applies to cases, where no time is fixed for repayment of the loan, *and to ordinary loans where no special agreement is made as to the time when the amount shall be payable. Where there is an agreement, fixing a certain date for repayment and the agreement is in writing, Art. 28 or Art. 55 applies. Thus, a suit to recover money lent with interest, upon a verbal agreement that the loan should be repaid within one year, is not governed by this Article but by Art. 55.* This Article would govern a case in which the lender transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee. (emphasis added.)

[23] The learned author opined that where there is a repayment period fixed, then art. 55 (art. 93 in the Sarawak Limitation Ordinance) would apply. Article 93 provides as follows:

1st Column	2nd Column Description of Suit	3rd Column Period of Limitation	4th Column Time from which period begins to run
93.	For compensation for the breach of any contract, express or implied, not in writing and not herein specially provided for ...	Three years	When the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.

[24] That means in this case, time would run from the year 2005 since the parties have agreed to pay the loan within ten years and the defendant can only be said to have breached the contract when he failed to pay after the time stated for payment has expired. In other words, the plaintiff's cause of action against the defendant would only accrue in 2005. I merely mentioned the years here because the exact dates are not crucial since the plaintiff instituted this action on 8 December 2006, well within the three years mentioned under art. 93.

[25] Thus, for all the foregoing reasons, I affirm the decision of the learned Sessions Court judge and dismiss the appeal with costs to be taxed unless agreed.